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Nos. 789–791

In the Supreme Court of the United States

October Term, 1943

E. G. Bilbo et al., William N. Clark et al., and Parnell et al., Petitioners

v.

United States of America

ON MOTIONS FOR LEAVE TO AMEND OR SUPPLEMENT RECORD AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 789–791

E. G. BLUE ET AL., WILLIAM N. CLARK ET AL., EARL PARDEE ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN RECORD AND ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (Pet. 70–90)[1] is reported at 138 F. (2d) 351. The opinion denying petitions for rehearing (Pet. 93–94) has not yet been reported. The opinion of the district court denying defendants' motions for a directed verdict appears at pages 3375–3394 of the transcript of testimony.

[1] The circuit court of appeals proceedings are filed with this Court as a separate document but are not paginated.

JURISDICTION

The judgments of the circuit court of appeals (Pet. 91–92) were entered on October 14, 1943, and petitions for rehearing were denied on February 9, 1944 (Pet. 93–94). The petition for writs of certiorari was filed March 14, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence as to petitioners, who were salesmen engaged in the promotion of the sale of cemetery lots for investment purposes, is sufficient to support their convictions under the mail fraud and conspiracy statutes.

2. Whether the fact that the trial of 36 defendants extended over a period of six months was a denial of petitioners' constitutional rights to a speedy trial.

3. Whether the admission of documents signed by petitioners which were taken from the correspondence files of a bankrupt corporation constituted a violation of petitioners' constitutional rights.

4. Whether it was prejudicial error to exclude proffered testimony of a state prosecutor that he had told petitioner Holcombe, before the latter accepted employment as a salesman with the

cemetery project, that he had found nothing wrong with the project, no proof having been offered that such statement influenced Holcombe's conduct.

5. Whether petitioners were improperly denied an opportunity to cross-examine a codefendant, the instigator of the project, who took the stand in his own behalf.

6. Whether the circuit court of appeals erred in refusing to remand the case in order to afford petitioners an opportunity to make a motion for a new trial on the basis of affidavits stating on information and belief that the jury had taken into consideration the failure of petitioners to take the stand in their own behalf, and other extraneous circumstances.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof,

> or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioners and others, 36 in all,[2] were tried in the United States District Court for the Southern District of Ohio, on a ten-count indictment

[2] The indictment named 44 defendants, but several entered pleas of guilty or *nolo contendere* and others died before trial.

charging use of the mails in the execution of a scheme to defraud and conspiracy so to use the mails (R. 1–22).[3] In substance, the scheme set forth in the indictment was one to acquire tracts of land and to organize corporations to develop such tracts as cemeteries and to sell sections therein to the public for investment purposes; to represent to prospective investors that there was a large unfilled demand for cemetery lots and guarantee to the investors profits of from twenty-five to one hundred percent under numerous different forms of contracts, the profits allegedly to result from the advance prices at which individual lots would be sold for burial purposes (R. 1–11).

The evidence for the Government may be summarized as follows:

In October 1933 the defendant Robert Marshall secured an option on 71 acres of land in Marion County, Ohio, and organized two corporations, Forest Glen, Inc., a profit corporation, and Forest Glen Memorial Park Association, a nonprofit corporation. Forest Glen, Inc., was made the exclusive sales agent of the association, with the right to retain 90% of the moneys secured from the sale of cemetery lots, out of which it was to purchase and improve the property. The remain-

[3] The designation "R." refers to the transcript of the proceedings in the district court. The designation "Tr." refers to the typewritten stenographic transcript of the testimony at the trial.

ing 10% was to be paid to the association as a perpetual care fund (Tr. 2477). In 1934 and 1936 two other nonprofit corporations were formed—Glen Haven Memorial Park Association near Springfield, Ohio, and Glen Rest Memorial Estate near Columbus, Ohio. These corporations made similar arrangements with Forest Glen, Inc., with respect to the sale and improvement of cemeteries (Tr. 2033, 3153). Forest Glen, Inc., in turn entered into a contract with Robert Marshall whereby he was to receive 50% of the money obtained through the sale of lots, for his services in superintending the development of the cemeteries and for payment of agents' commissions and promotional expenses (Tr. 2477, 2547, 2570). In 1937 a new company known as Robert Marshall, Inc., was incorporated, allegedly to assure the continuance of Marshall's genius as a promoter, and it took over Marshall's contract with Forest Glen, Inc. (Tr. 2033, 2561, 2570). Stock in this Corporation was sold to investors (Tr. 2564–2566).

Prospective investors in the cemetery properties were obtained from lists of persons owning shares in various building and loan associations, the assets of which had at the time been frozen. Salesmen would persuade the investors to cash in their shares, currently valued at about one-half of their face amount, and invest the money so received through Forest Glen, Inc., in order to recoup their losses. Investors were guaranteed 100% and later 50% profit, upon representa-

tions that the retail prices of the lots for burial purposes would exceed by at least that much the wholesale prices paid by them (see *infra*, pp. 9–12).

By November 1933, one month after Forest Glen, Inc., was organized and before Marshall had exercised his option to purchase the Marion County land, sales of lots for investment purposes totaled over $7,000 (Tr. 2478). By January 1934, $19,413.74 had been received from investment sales, but only $2,500 had been paid on the land and title was still in the original vendor (Tr. 2478–2479). At that time only $150 had been received for lots sold for burial purposes, yet $7,092 had been paid back to the original investors in the form of returns on their investments (R. 2480, 2483). Thus, from its inception the project was able to exist only by paying to early investors part of the money received from the later ones (Tr. 2483, 2541–2542).

From October 1933 to April 1934 investment sales were made under the so-called escrow plan whereby 20% of the investment was to be placed in a fund which, together with moneys received from the sale of the lots for burial purposes, was to be repaid to the investor in monthly allotments until his original investment was doubled (Tr. 2499–2500). Subsequently, various other plans were devised whereby investors would be promised regular payments on the lots, first in the form of interest plus payments of principal,

and then later merely of interest alone. Still later investors were induced to exchange their contracts for outright ownership of the lots on the representation that the investors could then sell the lots themselves and make more than 100% profit. Forest Glen, Inc., however, continued to "pick up," i. e., repurchase, lots from a few investors at 50% or 100% profit so that there were always a few investors who received the promised profit (Tr. 2494, 2499, 2501–2512, 2524–2526, 2640–2641).

The project continued until May 1938 when, as the result of state court litigation, new trustees of the cemetery associations were appointed. Forest Glen, Inc., was adjudged a bankrupt in June 1939 (Tr. 2777). As of May 1938, $1,840,582.81 had been received from the investing public and only $424,365.59 had been spent to improve the cemeteries. Sales of lots for burial purposes had realized a total of $344,568.36, but $803,950.73 had been paid to the investors. The perpetual care funds, to which there had been allotted $130,672.03, consisted of only $2,117.69 in cash; collateral in the form of accounts receivable for lots, mortgage notes, and other securities had been substituted for cash (Tr. 2326–2328, 2487, 2490, 2497, 2530–2536, 2545). There had been paid to Robert Marshall and Robert Marshall, Inc., the sum of $748,209.44 out of which salesmen and sales managers had received $574,653.48 (Tr. 2349, 2546, 2549).

The fifteen petitioners were all salesmen engaged in promoting the sales of lots for investment. Three of them—Clark, Holliday, and Reinwald were officers of Robert Marshall, Inc. (Tr. 2562) and apparently acted in an administrative capacity in Forest Glen Inc.[4] Their total commissions for the period up to May 16, 1938, amounted to $69,461.60, $24,244.89, and $54,809.64, respectively (Tr. 2548–2549). The evidence against the other twelve, as well as against these three, consisted for the most part of the testimony of persons who had been induced by them to invest money in the enterprise.[5] This testimony follows a consistent pattern.

Almost all were old people, many of them widows, who had invested all or part of their savings in building and loan shares. They were solicited by one or more of the petitioners and

[4] Clark assisted some of the other salesmen in making sales (Tr. 68–76, 2836–2848) and his correspondence with Robert Marshall (Exhibit 967A–K, Tr. 2404–2416) indicates that other salesmen reported to him. Holliday was active in mollifying investors who complained about not receiving payments and inducing them to accept "conversion" of their contracts to new agreements providing for lower payments (Tr. 289–291, 831–836, 918–920, 951–952, 1100–1104, 3118–3120). He inspired confidence because he had formerly been a preacher (Tr. 1102). Reinwald was financial manager of Forest Glen, Inc. (Tr. 2677) and assisted other salesmen in effecting sales or conversions of the contracts (Tr. 337, 1248–1249, 2773–2777, 2304–2305).

[5] For the convenience of the Court we summarize in the Appendix *infra*, pp. 22–24, the names of the persons as to whom the record shows petitioner had transactions, the amounts invested, and the amounts given as returns.

assured that investment in the cemetery project would enable them to double their money [6] or, later, that they would receive large returns on their investment.[7] Prospective investors were told that an investment in the cemetery project was safe or wise;[8] that an investigation of the surrounding area had revealed great need for a cemetery;[9] that the Government was backing the project.[10] Some of the salesmen implied that no returns would be received from building and loan shares [11] or that other investments were "shaky." [12] Investors were even promised that their lots would be repurchased whenever the money was needed.[13] When the two later corporations were organized several salesmen told prospects that the original Marion cemetery was very successful, that no more sections therein were available, and that the earlier investors were being paid regularly.[14]

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[6] Blue—Tr. 286–287, 319–325, 2905–2907; Malott—Tr. 329–332, 342–343; Neidigh—1752; Riggle—2989–2991; Clark—56, 1537.

[7] Berry and Deck—Tr. 226–233, 1091–1092, 1194–1196; Buck—Tr. 565, 663–668, 1994, 2073; Marshall—Tr. 7; Pardee—Tr. 903; Holcombe—Tr. 3100.

[8] Benman—Tr. 2067; Buck—Tr. 672–673; Holcombe—Tr. 2145–2148; Marshall—Tr. 7; Neidigh—Tr. 2955; Pardee—Tr. 897–899, 1889; Reinwald—Tr. 337, 2917–2921, 2276.

[9] McClure—Tr. 1374–1375; Malott—Tr. 329–332.

[10] Neidigh—Tr. 2945, 2947, 2960; Reinwald—Tr. 1715–1717, 3141–3147.

[11] Buck—Tr. 1993; Riggle—Tr. 2989–2991.

[12] Pardee—Tr. 897.

[13] Blue—Tr. 1177–1179; Clark—Tr. 1545.

[14] Benman—Tr. 2069; Buck—Tr. 2073; Clark—Tr. 66; Riggle—Tr. 2995–2996.

In some instances, investors testified that they thought they were getting lots in one cemetery and found them to be in another, or thought they were getting lots in the improved portion and found them in the unimproved.[15] After a first investment had been made the salesmen would then endeavor and often succeed in persuading the customer to make additional investments.[16] Frequently returns were paid on the original investments as a means of obtaining more of the customers' money.[17] Subsequently the investors would be persuaded to "convert" the contracts to outright ownership of the sections or to contracts

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[15] Blue—Tr. 311–315; Berry and Deck—Tr. 1203; Holliday—Tr. 3121–3124.

[16] Benman—370–371; Blue—1177–1179, 2910–2915; Berry and Deck—1080; Buck—504–520, 663–672, 2070–2089, 1990–2006; Clark—1897–1944, 2843–2848; Holcombe—3093–3103, 2263, 2175–2178; Holliday—918–920, 289–291, 951–952; Malott—333–335, 1238–1240, 1282–1285; Marshall—2293, 2110–2114; Neidigh—2950–2953; Pardee—2131–2138; Reinwald—2922–2926; Riggle—2187–2188.

[17] Clark—Ex. 967A–K, Tr. 2404–2416—Holcombe—Ex. 957A, D, H, J, K, Tr. 2831; Holliday—Ex. 962A, B, Tr. 2421, 2428; Marshall—Ex. 5286, Tr. 4850–4851; Pardee—Ex. 958A, Tr. 2402; Riggle—Ex. 959A, Tr. 2402.

Petitioner Benman told an investor who applied to him for a position as salesman that it was "hard to take peopel's money away from them after they had saved all their lives if you have not had any experience" (Tr. 360–361). During the course of the state litigation which resulted in the appointment of new trustees, *supra*, p. 8, Pardee and Buck called upon investors and asked them to contribute funds for attorneys' fees in order to enable the investors to regain control of the cemeteries (Buck—Tr. 672–675; Pardee—Tr. 401, 1255–1257, 1287, 1694–1697, 1764–1766).

providing for lesser benefits,[18] often on the representation that the new contract was a better one.[19] The various petitioners did not all make the same misrepresentations, but each made untrue statements along the same general line. See notes 6–15, *supra.*

In the files of Forest Glen Inc. there were found letters from a number of petitioners to Marshall or Reinwald which reveal that these petitioners were aware that payments to investors were not made regularly and that further investments could be procured if the promises to some investors were occasionally met. See note 17, *supra.*

In submitting the case to the jury the judge charged that, although a defendant might be convicted on circumstantial evidence, the circumstances must point so surely and unerringly to guilt as to exclude every reasonable hypothesis of innocence (Tr. 5309–5310); that it was necessary for the jury to find as to each of the defendants that there was a scheme to defraud, a purpose to mislead, an intention to obtain money or property by means of false pretenses, representations, or promises, and that the mails were used in execution of the scheme (Tr. 5325). He

[18] Blue—Tr. 1177–1179, 2915–2918; Buck—Tr. 663–672; Clark—Tr. 76, 1545, 2862–2863; Deck—Tr. 759–760, 981–982; Holliday—Tr. 289–291, 831–836, 951–952, 1101–1104; Malott—Tr. 335–336; Marshall—Tr. 2298–2302; Reinwald—Tr. 3015–3030.

[19] Holliday—Tr. 1102, 831–836; Malott—335–336.

specifically instructed the jury that it was for them to determine whether defendants made representations and promises with honest belief in their truth and that, if any defendant did have such honest belief, he was not guilty no matter how visionary the scheme might seem (Tr. 5328, 5331, 5334); that the sale of cemetery lots for investment purposes and the execution of contracts in connection therewith was not in itself unlawful but that the jury might find defendants guilty if they used such means as the vehicle of a scheme to defraud (Tr. 5332–5333); that they must find that each of the defendants knew the purposes and objectives of the alleged scheme to defraud and that they identified themselves with it with the intent of furthering its unlawful purpose (Tr. 5330; see also Tr. 5339). No objection was made to the judge's charge (Tr. 5347).

All of the petitioners, except Blue, Berry, McClure, and Neidigh were found guilty on all ten counts and sentenced to imprisonment for terms varying from three to six years and to pay fines of $1,000 each. The four above-mentioned petitioners were found guilty on the first count and sentenced to terms of either one year or eighteen months and to pay fines of $1,000 each (R. 262–271, 281–284, 291, 296). On appeal, the judgment as to each petitioner was affirmed (Pet. 91–92).[20]

[20] Thirty-three defendants were found guilty on one or more counts. Marshall died a few days after the verdict was returned. Of the twenty defendants who appealed to

ARGUMENT

1. Petitioners do not argue that the evidence was insufficient to establish a scheme to defraud or the use of the mails in the execution thereof. They contend merely (Pet. 12–13, 14–15, 16–17, 26–28, 34–58) that the proof was insufficient to establish that they knowingly participated in the scheme to defraud. While no one particular fact may in itself be regarded as conclusively establishing the guilt of any of the individual petitioners, the composite picture amply supports the conclusions of the jury, which were sustained by the district court and the circuit court of appeals, that petitioners were all implicated in the fraud. The untrue representations made by every one of the petitioners (see pp. 9–12, *supra,* pp. 22–24, *infra*), the multifarious contracts, many of them modified to suit individual cases, the age and stations in life of the victims and their obvious lack of comprehension of the intricacies of the agreements which they signed, the consistent attempts to obtain further investments after a few payments had been made on prior contracts, all warrant the conclusion that these salesmen went

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the circuit court of appeals, the convictions of five were reversed, one on the ground that the evidence was insufficient to show the defendant's participation in the investment part of the scheme, and four on the ground that the defendants had terminated their connections with the organization before the mailing of the letter which formed the basis of the count of the indictment on which they were found guilty (Pet. 87–88).

beyond legitimate selling activities [21] and engaged in a deliberate effort to defraud the aged and the credulous. The issue of petitioners' guilt was, therefore, a question for the jury. Cf. *United States* v. *Leathers,* 135 F. (2d) 507, 511–512 (C. C. A. 2); *Hawley* v. *United States,* 133 F. (2d) 966, 970 (C. C. A. 10); *Grell* v. *United States,* 112 F. (2d) 861, 870 (C. C. A. 8); *Pietch* v. *United States,* 110 F. (2d) 817, 820 (C. C. A. 10), certiorari denied, 310 U. S. 648. A similar situation was before the Seventh Circuit in *United States* v. *Beck,* 118 F. (2d) 178 (C. C. A. 7), certiorari denied, 313 U. S. 587, where the court upheld the convictions of both principals and salesmen who were engaged in promoting a comparable scheme for the sale of cemetery lots.

2. Petitioners contend (Pet. 13, 17–18, 27, 29–34) that they were deprived of their constitutional right to a speedy trial. Inasmuch as their counsel agreed to the limitation of trial sessions to four hours a day (see Pet. 29–30), they are in no position to complain of this procedure. Cf. *Daniels* v. *United States,* 17 F. (2d) 339, 343–344 (C. C. A. 9), certiorari denied, 274 U. S. 744. It is true that petitioners did voice an objection to the shortened sessions after most of the Government's case was in (see Pet. 30–32), and that at that time the court ruled that it would

[21] The trial court charged the jury that it was to distinguish between mere "puffing" and deliberate misrepresentation (Tr. 5328).

continue to have only morning sessions until the close of the Government's case, but the court stated that when the defense presented its case it would agree to whatever hours defense counsel wished (Tr. 2311–2313). Although the trial extended over a period of approximately six months, there was no undue delay. The trial involved a complex scheme extending over a period of about five years. Thirty-six defendants were on trial, and their individual participation in the scheme could only be shown by the testimony of their victims. Almost all of these witnesses were old people, several of them were hard of hearing, and many had difficulty in understanding the questions put to them. Most of them were cross-examined by more than one defense counsel. Under the circumstances, a lengthy trial was inevitable.

3. Petitioner Holcombe objects (Pet. 16, 28, 59–62) to the admission in evidence of letters written by him to Robert Marshall on the ground that no witness was on the stand when they were admitted in evidence. These letters had been taken from the files of Forest Glen, Inc., most of them were produced before the grand jury by the trustee in bankruptcy of that company, and all were identified at the trial by an inspector of the Post Office Department who had held them in his custody (Tr. 2323–2324, 2399–2402, 2460–2461). While the inspector was not on the stand at the

time the letters were actually admitted (Tr. 2831), Holcombe's attorney did not question the genuineness of the documents and expressly admitted that the signatures were Holcombe's (Tr. 2712–2713). The letters, some of which are referred to in the Statement, *supra,* p. 11, had considerable probative value as indicating that Holcombe knew that payments were not made regularly on the contracts and that the practice of repurchasing some lots was merely a means of inducing further large investments. The letters were obviously competent evidence and their admission did not, as petitioners contend, contravene the right to confrontation of witnesses guaranteed by the Sixth Amendment. Cf. *Salinger* v. *United States,* 272 U. S. 542, 548; *Mattox* v. *United States,* 156 U. S. 237, 242; *United States* v. *Leathers,* 135 F. (2d) 507, 511 (C. C. A. 2).

Holcombe also complains (Pet. 59–60) of the introduction of Government's Exhibit 967C, a letter from petitioner Clark to Robert Marshall taken from the files of Forest Glen, Inc., in which Clark referred to Holcombe's report to him of an interview with a prospective investor who had agreed to make additional investments if two of her sections were repurchased. The trial judge limited the consideration of this letter, insofar as it implicated Holcombe, to the tenth count charging conspiracy (Tr. 3356). This instruction was actually more favorable to Holcombe than

the law required, since the court might well have held the evidence applicable to all counts on the theory that a scheme to defraud, when shared by several persons, is itself a conspiracy.[7] On the conspiracy count it was clearly admissible against all defendants as a statement made by a co-conspirator in furtherance of the conspiracy (*Delaney* v. *United States,* 263 U. S. 586, 590; *Wiborg* v. *United States,* 163 U. S. 632, 657).

4. Petitioner Holcombe also contends (Pet. 14, 19–20, 27, 63–67) that the trial court erred in excluding proffered testimony by a state prosecuting attorney that in 1936 he had investigated complaints that Forest Glen, Inc. was not putting into improvements of the cemeteries the proportion of the money received from sales which it advertised, and that he had had an auditor investigate the books of the corporation and had found no basis for action (Tr. 4546–4570). The witness was originally called on Robert Marshall's behalf (Tr. 4562), but on preliminary examination outside of the presence of the jury, he revealed that in an accidental meeting with Holcombe in 1936 the latter had asked him about his investigation and that he had told Holcombe that he had found nothing wrong. Holcombe's attorney then offered to present this testimony to the jury on Holcombe's behalf (Tr. 4547–4550, 4561–4573). The trial court excluded the testi-

[7] *Robinson* v. *United States,* 33 F. (2d) 238, 240 (C. C. A. 9).

mony on the grounds that it would raise a collateral issue as to the nature of the state prosecutor's investigation, which related to a charge of an offense materially different than that charged in the indictment (Tr. 4555), and that testimony would not reveal the effect of the prosecutor's statement on Holcombe's state of mind (Tr. 4570). The prosecutor's conversation with Holcombe occurred before Holcombe accepted employment with Forest Glen, Inc., whereas the evidence to sustain Holcombe's conviction consisted of his acts and statements after he had accepted such employment (see *supra,* pp. 9–12). As the Circuit Court of Appeals stated, no proof was offered that the conversation with the prosecutor influenced Holcombe in accepting the employment. Even if it did, it would not serve to condone his later conduct. Hence, even assuming that the proffered testimony had some relevance as to Holcombe's motive in originally accepting the employment, its exclusion could not have been prejudicial.

5. There is no merit in the contention (Pet. 19–20, 68–69) that petitioners were improperly denied an opportunity to cross-examine the defendant Robert Marshall when he took the stand in his own behalf. Early in the presentation of the defense, after Marshall had given some testimony and while an intervening witness was on the stand, the trial judge ruled (Tr. 4456) that any witness called on behalf of one defendant might

be examined by counsel for any of the other defendants as a defense witness, and that if such counsel stated that the witness was hostile or represented conflicting interests, he would then determine whether to permit counsel to cross-examine the witness. Counsel for Holcombe stated that he had intended to cross-examine Marshall, but that after talking to Marshall he had concluded that Marshall was in no condition to testify and that he had therefore abandoned the plan (Tr. 4458). None of the other defense counsel sought to cross-examine Marshall. Hence, there was no occasion for the judge to rule as to the right of any of the petitioners to cross-examine him.[8]

6. After the notices of appeal had been filed, some of the petitioners filed a motion in the circuit court of appeals seeking to have the case remanded to the district court to permit them to file a motion for a new trial.[9] The motion for remand was based upon an affidavit of those petitioners that they had been informed and believed that the jurors had taken into consideration in arriving at their verdict the facts that petitioners

[8] The judge's prior ruling during the course of Marshall's appearance on the stand denying petitioners' motion to limit consideration of his testimony to himself (Tr. 4114–4121) affords no basis, in view of the subsequent ruling discussed in the text, for petitioners' contention that they were not permitted to cross-examine Marshall.

[9] See the transcript of the proceedings in the circuit court of appeals on file with the Clerk of this Court.

had not taken the stand in their own behalf and that the Government had spent a great deal of money in investigating and preparing the case. Although petitioners did not give the source of their alleged information, it is clear from the affidavit that they were relying upon the statements of a juror named Williams. Such impeachment of the verdict by a juror is not allowed in the federal courts (*Hyde* v. *United States,* 225 U. S. 347, 384; *Clyde Mattox* v. *United States,* 146 U. S. 140, 148; *Jordon* v. *United States,* 87 F. (2d) 64, 67 (App. D. C.), certiorari denied, 303 U. S. 654; *Davis* v. *United States,* 47 F. (2d) 1071 (C. C. A. 5), certiorari denied, 284 U. S. 646; *Williams* v. *United States,* 3 F. (2d) 933, 936 (C. C. A. 6)).

CONCLUSION

The decision below is correct and presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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APRIL 1944.